Arrest in flagrante delicto as a measure restricting the Right to Freedom

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Abstract

Arrest in flagrante delicto is one of the cases in which the international and national legal framework allows the restriction of the right to freedom. Currently, the individual and his fundamental rights are in the focus of human society. Some of them are absolute and some others have a relative character. The right to freedom, notwithstanding its importance, is a right of relative character but with cases of its restriction exhaustively defined.
The protection of this right is extended both in horizontal perspective versus the actions of other persons, providing a legal-criminal defense and in vertical context, in the face of repressive power of the state, which adopted the most significant position in the case of someone's arrest or detention. The latter constitute an indicator of an incomparable relation between the force of state power and a person's vulnerability.
The exact meaning of arrest in flagrante delicto and its application only in the conditions and criteria set out by the criminal procedural legislation prevents arbitrary restriction of the right to freedom. A key importance in the analysis of this institute is attached to ECtHR jurisprudence that is consolidated and detailed in addressing the right to freedom. The respect and application of standards affirmed by this court on part of the state institutions directly affects the consolidation of rule of law.
The criminal procedural legislation has consented to the general principle according to which "only the judge has the power to apply a security measure restricting personal liberty, a measure that has continuous effects over time, although such measures have a specific maximum duration". According to this approach, the arrest in flagrante delicto is qualified due to its character, as a temporary measure applied in situations of emergency when the procedure for security measure cannot be effectively applied. As already known, it is linked with the power of judicial police to take, in extraordinary, emergent, indispensable and compulsory cases provided by law, a provisional restrictive measure against an individual's freedom, without prejudicing the need for a guarantee by the judicial authority.

Keywords: arrest, *fundamental human rights,* freedom, flagrante, jurisprudence.

Introduction

Individual freedom is one of the fundamental human rights of international and constitutional legal character. Safeguarding of this right is a prerequisite for the full exercise of a number of other laws, such as the freedom of assembly and association, family life, the right to freedom of movement. Deprivation of such a right brings about physical, psychic and financial consequences influencing the life of a person and of his family.
The concepts of "freedom" and "security" refer only to individual physical freedom and security. Accordingly, the freedom of someone is freedom from apprehension or arrest while personal security means the protection from arbitrary intervention within the sphere of such liberty (

Nowicki, 2003, 121).
The protection of this right is extended both in horizontal perspective versus the actions of other persons, providing a legal-criminal defense and in vertical context, in the face of repressive power of the state, which adopted the most significant position in the case of someone's arrest or detention. The latter constitute an indicator of an incomparable relation between the force of state power and a person's vulnerability. The right to freedom intends to protect the person from arbitrary and unlawful deprivation of liberty (Engel and others, 1976).
The importance of protection of this right from arrest and detention is also reflected in early historic efforts of the mankind for its affirmation and legal protection.
Arrest in flagrante delicto and detention are key measures to be undertaken. They have a direct impact on the proper development and protection of human society but their application as a manifestation of the relative character of this right should be far from arbitrariness and only in cases and modalities expressly defined by law.
The purpose of this study will focus only on treatment of the institute of arrest in flagrante delicto as a measure restricting someone's liberty.

Meaning of flagrante delicto

In the framework of an individual's vital need for freedom and consequences derived from the arrest in flagrante delicto as a measure fully restricting this right, the exact meaning of this institute and its application only in circumstances and criteria set out by the criminal procedural legislation, assumes special importance. The exact definition of the concept of arrest in flagrante delicto avoids arbitrary restriction of the right to freedom. This objective has made the legislator treat in detail, as rarely before, the concept of this institute by providing a definition of the state of flagrante delicto (Unifying Judgment of Albanian High Court, 2002). Therefore, article 252 of the Criminal Procedure Code provides: "*It is under a state of flagrante delicto the one who is caught committing a criminal offence or the one who immediately after committing the offence is chased by judicial police, aggrieved party or other persons or one who is caught with items and exhibits that appear he has committed the criminal offence*".
As observed from the definition, it follows that arrest in flagrante delicto is a procedural act carried out on a real basis on concrete and not alleged or hypothetical data. If this real basis, these concrete data were absent, it is obvious that implementation of this procedural act is ill-grounded. The degree of reasonableness for the execution of arrest in flagrante delicto against a suspect of a criminal offence in the conditions *when he is apprehended in the act, during or immediately after the commission of act* or *when he is apprehended with items and exhibits*, would depend on special circumstances of every concrete case which should clearly be proven. Proving the state of flagrante delicto is considered both by the authorities making the arrest in flagrante delicto and by the prosecutor, when controlling the lawfulness and its grounds. (Baboçi, 1979, 99).
In the case of flagrante delicto the lawmaker has regulated a division or rating of two situations. Accordingly, the first part of provision regulating "*apprehension while committing a criminal offence or immediate chasing by police after its commission, aggrieved party or other persons*", involves a state of flagrante delicto for the apprehended person. Further, the second part "*caught with items and exhibits that appear he has committed the*

criminal offence" creates a quasi-flagrance state. The first situation is flagrant because *time relation between the fact and recognition is concurrent or immediate and recognition of the existence of offence and of perpetrator is present and is perceived directly from natural senses to the officer, judicial police agent or to the aggrieved party or another person, without the need of any evidence giving rise to recognition.*Hence, in case of the concurrence of recognition and direct perception, instantaneous apprehension or through immediate chasing is a component of fact establishing their credibility. Therefore, it is necessary that chasing should be a chronological activity occurring immediately after the commission of criminal offence, continuous and persistent as these characteristics build credibility. Further, the second situation is quasi-flagrant as the time relation between the fact and recognition is more remote and distanced,and belief is established by the recognition due to appearance of apprehension in the act with items, exhibits, i.e. an indirect one (Lara, 2010, 743).

When the suspect is arrested under the first two cases of flagrante delicto, namely *when he is apprehended committing the criminal offence or immediately after its commission is chased by the judicial police, the aggrieved party or other persons,* it is understood that in this context he is without doubt the perpetrator of criminal offence. In the first case, the perpetrator of criminal offence is seen and caught in the place where offence was committed. Even in the second case, it is again about obvious/apparent acts and the author is seen but is not caught, therefore he is chased (Islami, Hoxha, Panda, 2007, 383). As regards the third case of the state of flagrante delicto, items and exhibits are those determining the arrest in flagrante delicto. Traces of the criminal offence, knife, weapon, blood, stolen items etc are exhibits that in each case create reasonable doubts that the person to which they were found, may be the offence perpetrator (Baboçi, 1979, 102).

The person's arrest in flagrante delicto with items and exhibits represents a fact showing the link between an individual and a criminal offence committed, a link demonstrating that this person is a potential perpetrator of such offence but without its full verification. To reach a similar conclusion, in these cases it is necessary to carry out investigative operations, the results of which supplement with full evidence the overview of someone's being an offence perpetrator (Spiro, 1983, 68).

The same position adopted by the Albanian legislator regarding the concept of flagrante delicto is also pursued by the legislator of Italian state (Italian Criminal Procedure Code, art 381). Therefore, the latter considers as a state of flagrante delicto the apprehension of someone while committing a criminal offence, chasing immediately after its commission or when caught with items and exhibits from which it is concluded that the person has committed the criminal offence (Santi, 2014, 42).

This position is also enshrined in the Criminal Procedural Legislation of the Republic of Kosovo but with the difference that it does not regard as a state of flagrante delicto the case when the person is caught with items and exhibits from which it appears he has committed the criminal offence (Kosovo Criminal Procedure Code, art 162). Thus, according to the Criminal Procedure Code of the Republic of Kosovo, a state of flagrante delicto is considered the one when a person is caught in the act during the commission of criminal offence, which is chased in accordance with the official duty

or **is being chased** for the criminal act committed, police or any other authorized person shall provisionally arrest him even without a court order. The person whose liberty is deprived from persons other than police shall be immediately surrendered to police and if this is impossible, the police or public prosecutor shall be immediately informed thereof.

Conditions and criteria for the application of arrest in flagrante delicto

Criminal procedure law requires that for making the arrest flagrante delicto legally valid it is necessary to have the existence of nominally defined criteria in addition to the existence of the condition of flagrante delicto. In analyzing thereof we point out that the criteria required by law are as hereunder:

1. Existence of the criminal offense. Although the state of flagrante delicto is a fact situation that is perceived *ictu oculi*, it is understandable that in such a stage there cannot be any data that could fully argue the existence of the criminal offence, the guilt of the person who is the author of this offense and other circumstances, the explanation of which is crucial to provide appropriate solution to the issue. Investigation authorities have the duty to provide full and comprehensive argument on these aspects and in this regard the presence thereof as a whole shall not be required at the time of arrest in flagrante delicto. However, it should be noted that at the time of commission of arrest in flagrante delicto, the judicial police officers record this procedural action in the minutes of the arrest in flagrante delicto, which exactly establishes the place, date and time of arrest, the generalities of the arrested person, the offence that has occurred and the data that prove such offence. In the event of flagrante delicto the judicial police officers shall first evaluate whether the fact constitutes or does not constitute a criminal offense. Therefore, it shall make an approximate estimate of its legal setting, an assessment which facilitates and clarifies whether the terms specified in Section 251 of the CPC engage.
2. The offense must be classified as a crime and not as a criminal violation. To determine whether the act is or not a crime we have to refer to the Criminal Code, where Article1.2 thereof provides for that the difference between crime and criminal violation is made under the provisions of the Criminal Code's specific section.
3. The criminal code provides for the arrested person caught in flagrante delicto an imprisonment sentence in maximum not less than five years or imprisonment sentence not less than two years or for a negligent criminal offence, which the law prescribes an imprisonment sentence in maximum not less than ten years.
4. The existence of the general criteria laid down in Article 228/1 of the CPC. One of the criteria for taking of measures that restrict freedom *is the standard of reasonable doubt*, *based on evidence*. However, the Code does not provide that this standard is applicable for the arrest in flagrante delicto as a pre-security measure. Condition, the existence of which is necessary to execute arrest in flagrante delicto is the state of flagrante delicto. The state of flagrante delicto is a condition of

direct perception of the criminal fact by the judicial police. The existence of this state assumes the fulfillment of the standard of reasonable doubt based on evidence and it even reaches the level of conviction because the authorship of the crime is apparent. However, regarding the direct perception of flagrante delicto the judicial police can make mistakes regarding the perception of circumstances and legal qualification of the fact it perceives.

The judicial police has an important duty in executing the arrest in flagrante delicto. Since the judicial police is the competent authority under the criminal procedure law, it has the obligation to justify in there cord held for this purpose the cause of arrest in flagrante delicto and concrete information indicating the existence of the state of flagrante delicto, to execute this procedural action.

Regarding the arrest in flagrante delicto the Code does not require the criteria *of reasonable doubt*, because flagrante delicto is a state of fact. When a person is caught none of the cases of flagrante delicto while committing the offense, the authorship of the crime results from a specific fact situation, therefore it makes no sense to set the criterion of doubt, even within the restricts of reason. However article 256 of the Code provides for that when the prosecutor interrogates the person arrested or detained he informs the person arrested or detained on the act he is under proceeding and *the reasons of questioning, telling him information against him* and, without prejudicing the investigations, *the sources* (of information). This means that the state of flagrante delicto must be proven and the prosecutor has this obligation.

Conditions that function as the basis for arresting in flagrante delicto an individual who has committed criminal of fen se must not be suppositions but they must be created on the basis of concrete facts, which because of the short period of time between the moment of occurrence of the offense and taking the decision to stop the person (Criminal procedure Code 1979), they cannot be verified and specified to the extent that is necessary to establish a more stable measure against this individual, as it may be a precautionary measure. There are many facts on the basis of which there are created doubts that a person has committed a criminal offense to which the competent authorities are entitled to apply the measure of arrest in flagrante delicto, but they should always refer the offense committed and clear up the links between this offence and a person appointed as its author (Spiro, 1983, 67).

We can say that in a crime the arrest in flagrante delicto is a measure, which restricts the individual's freedom of movement. As such, the standards that legitimate taking of them are based on the Constitution and the ECHR, since freedom of movement is one of the fundamental rights and freedoms set forth respectively in Article 27 of the Constitution and 5 of the ECHR.

Article27, paragraph2, letter "c" of the Constitution provides for that freedom of the individual may be restricted when there *is reasonable doubt that the person has committed a criminal offense* or to prevent committing by this person an offense or fleeing of him

after committing the offence; Additionally, Article 1.5(c) of the ECHR provides that everyone has the right to liberty and safety of person. No one shall be deprived of his liberty, except in the following cases and in accordance with the procedure prescribed by law: c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority *on reasonable doubt* of having committed an offence or when it is reasonably considered necessary to prevent him committing an offence or fleeing after having done so;

It is important to emphasize Article 1.5 (c) of the ECHR for the importance that the Convention represents as part of our internal legal system. The text of Article 5 (1) clearly stipulates that the restriction of the freedom of an individual suspected of committing a crime can be made both before and after the commission of an offense on which the local authorities are based to justify this measure. ECHR has developed the criteria on which there is determined the lawfulness of the deprivation of an individuals' liberty. First, as it is observed in the case of *Lukanov against Bulgaria, the offense must have been committed under the domestic law, that on this basis, be considered legitimate restriction of freedom of the individual.* This does not mean that it is necessary to determine the fact of committing an offense at this stage. It is important that the measure, which restricts the freedom of the individual, be taken for the purpose of an offense, as provided for in law (Macovei, 2005, 23). To this regard, the Commission and thereafter the ECHR found that there could not be talked about grounded doubt, because the action, for which *Lukanov* was accused, did not constitute a criminal offense at the time of its commission. Therefore, the arrest of *Lukanov* was not executed in accordance with law and was not made in connection with the grounded doubt of committing a criminal offense (Nowicki, 2003, 136). Following the first criteria discussed above, the ECHR has developed two other criteria. The second criterion provides that *the objective of the detention of a suspect for committing a criminal offense should be bringing of him before a competent legal authority.* The third criterion provides that *doubt on commission of an offense must be reasonable* (Macovei, 2005, 24). Despite that the existence of doubt of a criminal offense commission (...), is the basis on which there can be reviewed the restriction of the freedom of an individual, such a measure would be consistent with Article1.5(c) only if it is done with the intent of commencing criminal proceedings against the person suspected. However, this does not mean that to be consistent with Article1.5(c) prosecution must be developed or a formal indictment (...) must be established

Article1.5(c) of the ECHR does not refer simply and only the application of security measures, but also arrest and detention as forms of restriction on freedom of movement. Through its jurisprudence the ECHR has expanded the scope of this article even in these cases of restriction of freedom. It is accepted that when a police officer tells the individual, in words or by physical actions, that the latter is not free to leave,

then we have an arrest within the meaning of Article 5 (Shameti, 2006, 25). The Commission said that deprivation or freedom of a person taken to the police station will depend on the purpose of the police. Additionally, an individual who is forced to remain in custody in the street or elsewhere in order to be interrogated by the police, to be controlled or testify regarding a criminal proceeding, is protected by Article 5. In this sense, Article 5 applies also when the period of detention is very short and when a detainee turns himself to the police to be detained (Shameti, 2006, 26).

Although the need to start criminal proceedings against a suspect or the need to prevent the commission of another offence constitutes the initial basis to restrict the freedom of a person suspected it is not sufficient for continuation of detention. Continuation of detention shall be subject to prompt judicial investigation. First of all, the Court must consider whether the restriction of freedom is a measure justified, and secondly, whether it is still appropriate to continue. ECHR *has repeatedly stated that the existence of a doubt is essential, but not enough to extend the detention after the elapse of the deadline* (Macovei, 2005, 29).

Therefore, it can be said that the main operative standard of Article1.5(c) is *reasonableness*. ECHR has determined that the standard applied to restrict the freedom of the individual does not mean that the state is required in this stage to prove the guilt. In fact, Article5does not presuppose that the police must collect enough evidence to raise charges. However, *at this stage the State should base the arrest and detention at least over a certain level of evidence or information to confirm the doubt that an unlawful act was committed and that the detainee has a sufficient connection with the commission of the offense in question* (Gomein, 2005, 37).

Pursuant to Article1.5, the reasons for detention must be specific and legitimate in terms of the ECHR.Article5 does not permit the detention of someone under unclear doubt.Article5 does not even allow detention under un-materialized grounds in official decisions taken by competent authorities.

One of the most important issues of the ECHR that shows that reasonable doubt is the standard required in the case of arrest or detention is the case of *Fox, Campbell and Hartley against the United Kingdom*. In this decision the ECHR has expressed that Article1.5(c) speaks about a "reasonable doubt", (Virgil. D, Gus, Reichle, Steven, Howards, 2012), rather than a simple and in bona fide doubt. "Reasonability" of doubt, on which the arrest should be based, establishes an essential part of protection against arbitrary arrest and detention. ECtHR has stated that the existence of a "reasonable doubt" presupposes "*the existence of facts or information that would create the belief of an objective observer that the person concerned might have committed the offense. However, what would be considered "reasonable" will depend on and will be determined based on all the circumstances."* In this regard, the crime of terrorism constitutes a special category. Given the risk that such a crime poses for the suffering and loss of human

lives, the police have a duty to act with urgency, in order to collect all necessary information including the information from secret sources. Police may detain a person suspected of terrorism, on the basis of information that can be reliable but cannot be made known to the person suspected or can be delivered in court in support of the charges without putting in danger the source of information.

The court has upheld the government's argument according to which because of the unique challenges encountered in the process of investigation and prosecution of the acts of terrorist nature "*the character of reasonable doubt that justifies the arrest cannot be always figured based on the criteria which figure a conventional crime.* However, *the criteria for the treatment of a terrorist crime cannot justify the extension of 'reasonableness', to such an extent that could impair the essence of protection that is provided for in Article 5 of the ECHR".*

The ECtHR stated that "*Article 1.5 (c) of the ECHR shall not be implemented in a way that could create excess difficulties for the police of the Contracting States to take measures against terrorism. It follows that the Contracting States cannot be required to prove the reasonable character of a doubt, which has served as the basis for the arrest of a suspected terrorist, by revealing confidential sources of the relevant information or even the facts that could lead to the disclosure of such sources or their identity. However, the ECtHR has the task to ascertain whether it is guaranteed the core provided by Article 1.5 (c)."*

The Court has recognized that the arrest and detention of each of the applicants was based on a doubt in good faith and not on a reasonable doubt. The fact that the applicants had previous convictions for acts of terrorism and the police during the arrest had a real doubt that the applicants had been involved in other acts of this kind cannot convince an objective observer that the applicants might have committed these acts. The above elements were considered insufficient to support the conclusion that there existed "reasonable doubt". Explanations of state authorities did not meet the minimum standard set out insection1.5(c) to judge the reasonableness of the doubt of an individual's arrest. Accordingly, the ECtHR has found that Article5.1(c) was violated.

Therefore, we can say in conclusion that the existence of a state of flagrante delicto presumes the standard of reasonable doubt based on evidence. Such a conclusion is consistent with the standard required by article5/1/ c of the ECHR and Article27/2/ c of our Constitution regarding the arrest. The ECtHR's practice discussed above is consolidated in this regard affirming that the measures restricting the freedom of the individual must be based on a reasonable doubt (Case *Brogan et al against the United Kingdom,* ECtHR, 1988; *Murray against the United Kingdom,* EHCR, 1994).

Therefore, our doctrine has held that when conducting an arrest in flagrante delicto the judicial police must take into account *the general criteria* for determining the security measures(Including the existence of reasonable doubt and the absence of causes of

impunity or extinction of the offense).

Article 251/1 of the CPC provides for the obligation of the judicial police officers to perform compulsory arrest in flagrante delicto of whoever is caught committing or attempting to commit an intentional crime, which the law prescribes an imprisonment sentence in maximum not less than five years. This form ofarrest in flagrante delicto is considered compulsory arrest in flagrante delicto, because the judicial police have the obligation to carry out the procedural action.

Whereas article 251/2 of the CPR prescribes that judicial police officers have the right to arrest in flagrante delicto whoever is caught committing or attempting to commit an intentional crime, which the law prescribes an imprisonment sentence in maximum not less than two years or a negligent criminal offence, which the law prescribes an imprisonment maximum sentence of not less than ten years. This form ofarrest in flagrante delicto is called optional arrest in flagrante delicto because it is in the assessment of the judicial police to carry out this procedural action. Optional arrestin flagrante delicto differs from the compulsory arrest in flagrante delicto, as in the latter the judicial police are obliged to execute the arrest. The law does not specify any selection criteria to distinguish when to apply or not to apply the optional arrest in flagrante delicto, which remains at the discretion of the judicial police that must assess in each specific case the needs for protection and care to the public. (Lara, 2010, 746) Apparently, the wording of the provision gives the impression that the judicial police have abroad discretionin assessing each case. However, it is clear that the evaluation parameters OF the"*importance of the fact*" or"*dangerousness of the subject*" that are derived fromt he circumstances of fact and personality of the author constitute restriction of the judicial police discretion (Conso & Grevi, 2011, 1507).

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